(19)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 347

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

JOHN T. D. BLACKBURN, INC., and MILCOR STEEL CO.,
Defendants-Respondents,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

Petitioners' Reply Brief in Opposition to the Answering Brief of the Respondent, John T. D. Blackburn, Inc.

This reply brief will concern itself solely with the statement made by the respondent, John T. D. Blackburn, Inc. in Point I of its answering brief that: "The evidence shows that the application of January 24, 1940 was made upon debts actually due for previous shipments." The argument is based upon a group of figures set forth on pages 3 and 4 of the respondent's brief for which there is no support whatsoever in the record. To dispel any

erroneous impression which might possibly be created by those non-existing figures, we turn to the record:

The only original records maintained by the respondent, John T. D. Blackburn, Inc., for the Sherman account consisted of four original ledger cards which were received in evidence as Exhibit M-50 (R. 439-440; 499; 580). They contained periodic typewritten entries of general credits and debits, representing, in Blackburn's own words, "one continuous running account of all jobs" (R. 455-456; 498). They were received in evidence as Exhibit M-50 (R. 455), solely and only for the typewritten material contained thereon and the pencil notations showing the destination of each shipment, all of the other pencil and ink notations being disregarded in their entirety (R. 454-455). They were maintained under the complete supervision of Charles V. Legge, Blackburn's secretary-treasurer for approximately fifteen years (R. 519), until he left the company's employ in September of 1940 (R. 446-448; 470; 501), approximately six months after the present action was instituted.

An examination of Exhibit M-50 (R. 580) reveals the following entries:

Date and Folio		Debit	Credit	Balance
Dec 28 '39.....	7,885.10 #		50.00	917.41 —CR
Jan 24 '40.....	620.10 #	65.95		1,810.10 —CR
Jan 26 '40.....	745.10 #	337.92		1,185.02 —CR

Thus, from Blackburn's own original records, it undisputably appears that, on January 24, 1940, two weeks after the last delivery to the Newtown job, Sherman's credit and debit account on Blackburn's books showed a credit balance of $1,810.10 which had extinguished all of Sherman's obligations, including his obligations for the Newtown deliveries. From that day onward, Sherman's

credit balance was wiped out and his debit balance steadily rose as a result of Blackburn's deliveries to Coxsackie, Dannemora, Bedford Hills and Beacon jobs which were made after January 24, 1940, resulting in the final debit balance of $10,157.47 (Exhibit M-50, R. 580). Obviously, therefore, that entire debit balance was due to the obligations incurred by Sherman long after January 9, 1940, the date of Blackburn's last delivery to the Newtown job.

In ruling that the subsequent obligations had been discharged and the Newtown indebtedness was still unpaid, the Trial Court necessarily ruled that the monies received by Blackburn between July 19, 1939 and January 9, 1940 could be reapplied, many weeks and months after the monies were received, to obligations which were not in existence, or even contemplated, when the payments were made. Chief Judge Hutcheson, in his dissenting opinion, found the foregoing fact to be "undisputed" and established by the "admitted facts" (149 Fed. (2nd) 308, 309). Judge Clark, in his majority opinion, does not deny the existence of the fact (149 Fed. (2nd) 307). He based his position upon the contention that the law, as he viewed it, permitted such a reallocation of payments received under such circumstances to an obligation which did not exist, or accrue, until long after the payments were made (149 Fed. (2nd) 307, footnote 1).

Judge Clark's reference to "the jumbled bookkeeping accounts contained in Exhibits 22 and M-50" (149 Fed. [2d] 307, Footnote 1) is, of course, of no aid to the respondent. The records to which the Judge referred are the respondent's own records. It bore the burden, throughout the course of these proceedings, of establishing its compliance with the condition precedent to its recovery upon the Connecticut bond involved in this action, *i.e.*,

that it was a party "who has not been paid" for its deliveries to the Newtown job. Consequently, unless Judge Clark's view of the law is correct, the respondent must fail. And, as we have pointed out in our original brief, Judge Clark's view of the law contravenes the law of Connecticut, the law of New York, the common law of the various States, the common law of England and the Roman Civil law from which the doctrine of allocation was first obtained.

No other claim or argument contained in the respondent's brief requires any answer under the authorities contained in our original brief.

Dated, September 20, 1945.

Respectfully submitted,

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LOUIS A. TEPPER,
Counsel for Petitioners.